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IN THE

Supreme Court of the United States

OCTOBER, 1945, TERM.

No.  152

ROBERT W. BARNES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF THE STATE OF NEW YORK AND
BRIEF IN SUPPORT THEREOF.

PETITION AND BRIEF OF THE PETITIONER.

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1888

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IN THE
Supreme Court of the United States

ROBERT W. BARNES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK.**

*To the Honorable, the Chief Justice of the United States,
and the Associate Justices of the Supreme Court of the
United States:*

The petition of Robert W. Barnes, by his attorney,
Thomas L. Newton, respectfully shows as follows:

Statement.

That your petitioner believes this Court has jurisdiction herein under sec. 237 (b) of the Judicial Code as amended, 28 U. S. C. sec. 344 (b), providing a final judgment in any suit in the highest court of a State in which a right under the United States Constitution has been violated may be reversed by this Court.

That the judgment or order of the Court of Appeals of the State of New York affirming the conviction of your petitioner of the crime of Murder, First Degree, with one Judge dissenting, was rendered March 7, 1946 (People vs.

Barnes, 295 N. Y. 767), and its judgment was made the final judgment of the Supreme Court, Niagara County, State of New York, April 2, 1946 (rec. pp. 651, 653); that the remittitur of the Court of Appeals, through the same was requested in the petitioner's brief and on the argument of his appeal before said Court, did not state that your petitioner raised a Federal Question that his rights under the due process of law clause of the Fourteenth Amendment of the United States Constitution had been violated and necessarily passed on by the Court which decided that his rights thereunder had not been violated; that your petitioner made a motion in the said Court of Appeals returnable May 20th, 1946, to amend its said remittitur, to show that your petitioner raised said Federal Question as requested in his brief and argument, which motion is pending, and a certified copy of its decision thereon was requested to be sent directly to the Clerk of this Court by the Clerk of said Court of Appeals, the same to be made a part of the certified copy of the record on this application for a writ of certiorari.

That the Federal Question involved is the violation of your petitioner's rights under the due process of law clause of the Fourteenth Amendment of the United States Constitution in that his said conviction was obtained upon alleged oral and written admissions and confessions coerced and compelled from your petitioner and this question was raised in the first instance on the trial of the case in Supreme Court, Niagara County, New York, before a Court and Jury, as to the oral admissions and confessions by your petitioner's objection that what your petitioner said confessions were the result of threats, expressed and implied, and such evidence would be admitted in violation of the due process of law clause of the Fourteenth Amendment of the United States Constitution, which objection was overruled

(rec. p. 267), and as to the two alleged written confessions, People's Exhibits 46 and 47, by the same objection, which was overruled (rec. p. 280), and then by your petitioner's motion made at the close of all the evidence to strike from the evidence the two alleged written statements, Exhibits 46 and 47 in evidence (rec. pp. 307-316), claimed to be confessions, upon the ground the statements were taken in violation of the due process of law clause of the Fourteenth Amendment of the United States Constitution and were involuntary as matter of law, and then again by motion for a mistrial on the ground that receiving those statements in evidence was such prejudicial matter as could not be remedied by any instruction of the Court, which motions were denied with exception (rec. pp. 542, 543), and then as to the oral admissions or alleged confessions and the written confessions by your petitioner's motion made immediately after the jury's verdict of guilty for a new trial upon all the exceptions in the case and that the verdict of the jury was contrary to law and clearly against the evidence, which motion was denied with exception (rec. p. 640); that said Federal Question was next raised on appeal in the Appellate Division of the Supreme Court of the State of New York Fourth Department, which on June 27th, 1945, affirmed your petitioner's judgment of conviction, without opinion, with Harris, J., dissenting and voting for a reversal and for granting a new trial, in a memorandum, in part, as follows, " * * * The ruling of the Trial Court and its charge as to a violation of Sec. 165, Code Cr. Proc. was insufficient to advise properly the jury. People v. Malinski, 292 N. Y. 360, reversed 324 U. S. 401. With the above in mind, it cannot be said that the defendant was not prejudiced on his trial. * * *" (People v. Barnes, 229 A. D. 898, rec. p. 649); that said Federal Question was next raised on appeal in the Court of Appeals of the State of

New York, where on March 7th, 1946, your petitioner's judgment of conviction was affirmed without opinion, all concurring except Dye, J., who dissented and voted for a new trial, Madalie, J. deceased (People v. Barnes, 295 N. Y. 767).

That your petitioner was convicted of the crime of murder, first degree, September 29, 1944, in the Supreme Court, Niagara County, State of New York, and then sentenced to life imprisonment pursuant to recommendation of the jury's verdict (rec. pp. 5, 6, 639).

That the question involved is if the admission in evidence of two alleged written confessions in particular was as to the petitioner a denial of due process of law under the Fourteenth Amendment of the United States Constitution.

That the indictment herein was filed Sept. 8, 1944, in Supreme Court, Niagara County, New York, and charged that on Aug. 4, 1944, at the City of Niagara Falls, Niagara County, New York, your petitioner committed the crime of Murder, First Degree, in that he of malice aforethought strangled and killed Miriam Kennedy (rec. p. 6) and petitioner was arraigned thereon the same day and plead not guilty (rec. pp. 3, 4) and charged the same day by Bill of Particulars then filed that at the time Miriam Kennedy was killed your petitioner was engaged in the commission of a felony upon her person, to wit, Rape in the First Degree, and the act took place at 625 Dorothy Street on the early morning of the date alleged (rec. p. 3).

Undisputed Facts.

That your petitioner was arrested at about 5:00 P. M. August 17, 1944, and questioned that evening maybe 45 minutes in the presence of Officers DeBrine, Stephens, Wasley, Wagner and Fitzsimmons and District Attorney Marsh, concerning his movements the night of August 3rd and the morning of August 4th, and got through questioning about 7:00 that evening, and resumed at about 8 o'clock with Officers Fitzsimmons, DeBrine, Stephens, Hageman, Cruickshank, Wasley and Wagner present and they concluded questioning him about 11:00 P. M. when he was placed in a cell. He said he did not know anything about the murder of Miriam Kennedy. The following morning he was questioned about an hour and forty-five minutes in detail concerning his past life with Officers DeBrine, Stephens and Fitzsimmons and District Attorney Marsh present. He was brought before Officer Fitzsimmons about one o'clock and Fitzsimmons told him they were taking him to Buffalo to put him on the lie detector and he said he had no objection (rec. pp. 238-250). Officers Fitzsimmons and DeBrine took Barnes in a car to Buffalo Police Headquarters where they arrived at 2:45 P. M. Officers Fitzsimmons and DeBrine talked with Anthony Schasre, the lie detector operator, for 20 to 25 minutes. Barnes was in the lie detector room with Officer Schasre an hour and 40 or 50 minutes. He was in the room some time while Schasre talked to him before he was put on the machine and questioned by Schasre and then the machine was disconnected and Schasre talked to him for 20 minutes (rec. pp. 251-252). Schasre talked to the petitioner an hour and fifty minutes altogether and he then came out of the lie detector room (rec. p. 253). Schasre returned to the lie detector room and had an argument with Barnes in which Schasre said to Barnes "You are a lying black bastard" and then Chief of Detectives Golembeck left

the lie detector observation room and went into the lie detector room (rec. pp. 255-256) and struck Barnes somewhere in the face and he went down on the floor right near the chair where he was sitting (rec. pp. 336, 337, Officer DeBrine's testimony, who said Schasre called Barnes "a God damn lying nigger bastard, rec. p. 336) and Barnes was told to get up from the floor and take off his trousers and shorts but he made no effort to get up so they were taken off while he was lying on the floor, and then when Barnes did not get up the officers raised him and set him in a chair (rec. pp. 260, 261) and the shorts are People's Exhibit 25 in evidence (rec. p. 261). During all this time Barnes did not admit any participation in the murder (rec. p. 263). Then Officers Fitzsimmons, DeBrine and Fitzgibbons went into the lie detector room and told Barnes to put on his trousers, which he did, and they took him to another room and questioned him for about an hour and Barnes denied all knowledge of the crime and made no change in statements made before (rec. pp. 263, 264). At about 6 o'clock Officers Fitzsimmons and DeBrine left the Buffalo Police Headquarters with the petitioner in a car for Niagara Falls and Barnes was further questioned by the officers in the car and they told Barnes he was lying, that they knew he was lying, that when he claimed he wore 34 shorts he was lying, that when he said he knew nothing about the Kennedy Murder case he was lying, the various questions that he had been asked in the lie-detector room proved he was lying and that they had his prints and after they had passed over the Grand Island Bridge nearest Buffalo and for a short distance on Grand Island and Fitzsimmons and DeBrine were talking as they were going over Grand Island about different cases they had been on and reached the peak of the next bridge and started down toward Buffalo Avenue, Niagara Falls, Fitzsimmons called DeBrine's attention to an electric light pole part way down on the

bridge and said, "That electric light pole marks the spot from which an elderly man was thrown into Niagara River some time ago and there is now a man by the name of Knight who is now in Sing Sing waiting the execution of his sentence. He didn't know how to tell the truth either," and they continued down the bridge 400 feet (rec. pp. 265, 266) in Buffalo Avenue, Niagara Falls, and the defendant asked what sentence will he get and when told it was up to the Judge and Jury then said, "If you will take me to see my wife I will tell you about the Kennedy murder case because I killed Mrs. Kennedy" (rec. pp. 267, 268) and then Officer Zimmerman stated what the petitioner said (rec. pp. 269-274) and thereafter what was said was taken in the written statement, People's Exhibit 46, commencing at 9:17 and ending at 11:19 that evening (rec. pp. 277-279) and signed at 11:22 P. M. August 18, 1944 (rec. p. 280) and he was questioned the next morning by Officers Fitzsimmons and DeBrine till around 11:30 and this was reduced to writing and signed by the petitioner at 8:15 P. M. August 19th and contained matter in addition to People's Exhibit 46, the last statement being People's Exhibit 47 (rec. pp. 288, 289, 307-316).

That the Police Officers prevented your petitioner's personal doctor from seeing him at the Niagara Falls police station though the doctor called at the station at 3 and 4 o'clock P. M. August 20, 1944 (rec. pp. 421, 422).

That Officer Fitzsimmons knew when he took the petitioner into custody that Section 165 of the Code of Criminal Procedure provided "The defendant must be taken before a magistrate without unnecessary delay and he may give bail at any hour of the day or night" and yet he did not arraign your petitioner in the City Court of Niagara Falls

till 3:30 P. M. August 20, 1944, Sunday, a rare exception as to time of holding the Court (rec. pp. 299, 321).

That Officer Fitzsimmons' preliminary examination before admission of People's Exhibits 46 and 47 showed that during the time your petitioner was in custody he was not allowed to see any person till 1:00 A. M. August 19th, which was after he had signed Exhibit 46, and that person was his wife (rec. p. 301), when they took her into custody (rec. p. 322) at his home with an officer present (rec. p. 361) and was not allowed to see anybody else until after the investigation was completed (rec. p. 303).

That the Court of Appeals of the State of New York has decided the said Federal Question in a way probably not in accord with the applicable decisions of this Court, to wit, *McNabb v. United States*, 318 U. S. 332, *Chambers v. Florida*, 309 U. S. 227, *Aschraft v. Tennessee*, 322 U. S. 143 and *Malinski v. New York*, 324 U. S. 401, cited by your petitioner in his brief before said Court of Appeals of the State of New York.

That the Court of Appeals of the State of New York in affirming petitioner's conviction sustained the trial court over objection and exception and prevented your petitioner from showing he was not allowed to consult his attorney while in custody of the Niagara Falls Police without a Niagara Falls Police Officer being present on the morning of August 21, 1944, when time was of vital importance to your petitioner in protection of his rights under said due process of law clause of the Fourteenth Amendment of the United States Constitution, and in its ruling made the law of the Supreme Court of New York State controlling over the decisions of this Court, which matter

was presented by your petitioner on his brief and argument in the said Court of Appeals on his appeal to said Court (rec. pp. 302, 303).

Wherefore, your petitioner, Robert W. Barnes, prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Court of Appeals of the State of New York, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record of the Court of Appeals of the State of New York affirming the judgment of conviction that it may be reviewed and reversed and that your petitioner may have such other relief as may be just and that if your petitioner's motion in the Court of Appeals of the State of New York to amend its remittitur, now pending, is not decided by that Court within 3 months from March 7, 1946, within which time this petition must be filed with this Court, the petitioner's time to file this petition for a writ of certiorari be extended under sec. 350, Judicial Code, for not to exceed sixty days.

Dated, June 3, 1946.

ROBERT W. BARNES,
Petitioner,
by THOMAS L. NEWTON,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

THOMAS L. NEWTON,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES.

ROBERT W. BARNES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

The statement under which jurisdiction of this Court is invoked, the question presented and the undisputed factual matter relevant to this application with authorities believed applicable appear in the petition to which this brief is annexed.

Indictment.

The indictment is based on part of Sec. 1044, Penal Law, State of New York, which provides as follows:

“The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: * * * 2. * * *; or without a design to effect death, by a person engaged in the commission of, or an attempt to commit a felony, either upon or affecting the person killed or otherwise; or,—”

Punishment.

Sec. 1045 of the Penal Law provides as follows:

“Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided in section ten hundred forty-five-a.”

Sec. 1045-a of the Penal Law provides as follows:

"A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four may, as part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life."

Under this section the petitioner was sentenced to imprisonment for life (rec. pp. 5, 6, 639).

The jury's recommendation under section 1045-a is not binding on the Court.

People v. Ertel, 283 N. Y. 519.

Bill of Particulars.

The Bill of Particulars when filed became, in effect, a part of the indictment.

People v. Bogdanoff, 254 N. Y. 16.

The Crime.

Miriam Kennedy was a young married white woman, residing with her husband, Alvie J. Kennedy and their three children, James 8 years, Evelyn 4 years and Ronald 2 years, in a ground floor apartment in the Pineacres Federal Temporary Housing Project, on the outskirts of the City of Niagara Falls. The project, built to accommodate 1700 families, was made up of over one hundred two-story sixteen family dwelling units covering a wide area. At the time of the murder only about 100 families lived in the entire project; a group of white families in the neighborhood of the apartment occupied by the Kennedy's at No. 625 Dorothy Street, and a group of colored families on 69th

Street where the defendant resided, about six or seven blocks from the white settlement.

On the morning of August 4, 1944, Mr. Kennedy completed a 13-hour shift at the Bell Aircraft Corporation, about 3 miles from his home; punched out at the time clock at the plant at 5:30 A. M., and immediately started for his home in a friend's car. His 4 year old daughter answered his call to unlock the front door, and when he entered he found his son, James Kennedy, in a highly emotional condition. He went through to the bedroom occupied by his wife and two youngest children and there found his wife lying on the floor dead; her legs spread apart; the lower portion of her night gown up over her private parts; her underpants around her neck; and marks on and about her throat and neck.

An autopsy on the murdered woman's body showed numerous cuts and laceration about the neck and throat and the cause of death asphyxiation by strangulation. Spermatozoa was present in the vagina (rec. pp. 56, 87, 90).

ARGUMENT.

The petitioner asserts that he has been convicted of the crime of murder and been sentenced to life imprisonment as the result of a trial that deprived him of his rights under the due process of law clause of the Fourteenth Amendment of the United States Constitution.

"The complaint is not of commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere process of law."

Brown v. Mississippi, 297 U. S. 278, 286.

POINT I.

The admission in evidence of People's Exhibits 46 and 47 over the petitioner's objection and denial of his motion to strike the same from the evidence made at the case's close, being the alleged confessions of the petitioner, with exception, together with the denial, with exception, of the petitioner's motion for a new trial on the ground the verdict of the jury was contrary to law and against the evidence, constitute a violation of petitioner's rights under the due process of law clause of the Fourteenth Amendment of the United States Constitution (rec. pp. 298, 304, 302, 305, 307-316, 542, 543, 544, 640).

State Statutes and Constitutional Clauses Involved.

"The defendant must in all cases be taken before a magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

Sec. 165, Code of Criminal Procedure.

"Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Amendment XIV, United States Constitution.

"No person shall be deprived of life, liberty or property without due process of law."

Section 6, Art. 1, Constitution of State of New York.

The holding of the United States Supreme Court in *Malinski v. New York*, 324 U. S. 401, affirming and reversing in part *People v. Malinski*, 292 N. Y. 360, is as follows:

"The question whether there has been a violation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession is one upon which this Court must make an independent determination on the undisputed evidence."

"If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant."

"A conviction obtained by use of coerced confession will be set aside even though the evidence apart from the confession might have been sufficient to sustain the verdict."

"The judgment against Malinski, resting in part on a coerced confession, must be reversed. A majority of the Court do not reach the question whether the subsequent confessions were free from the infirmities of the first."

"Sec. 395, Code of Criminal Procedure, provides in part as follows: A confession of a defendant whether—to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, * * *; but is not sufficient to warrant his conviction without additional proof that the crime charged has been committed."

People's Exhibit 46 is, in substance, a repetition of what the defendant said after Fitzsimmons and DeBrine crossed the Grand Island Bridge into Niagara Falls and People's Exhibit 47, in substance, is the same with statements as to additional crimes (rec. pp. 265-274, 338-342).

IN PART

Defendant's Version of his Arrest, Treatment and Questioning.

The police came to the petitioner's home Saturday night, Aug. 5, after which the appellant went to Police Headquarters at 9:30 A. M. Monday and the police then took his palm prints and head and pubic hair and scraped the dirt from underneath his fingernails. There was no proof of any white epithelium cells or human blood found in these scrapings yet there were on Miriam Kennedy's throat three overlapping fingernail scratches three-eighths to one inch in length and three circular lacerations one-half inch long on the left side of her neck (rec. pp. 52, 407, 409, 410).

Her fingernails were scraped underneath after her death and the scrapings therefrom were sent to the laboratory at Albany and returned to the Falls police (Fols. 984, 985). The condition of the deceased's bedroom and the position of her body clearly disclosed she had powerfully resisted her assailant undoubtedly scratching him with her fingernails, yet no proof any brown epithelium cells or human blood or negroid head hair was proven on the trial as evidenced by her fingernail scrapings (rec. pp. 48, 92).

Barnes was taken into custody by the Falls police about 5 o'clock P. M., Aug. 17, 1944. His fingerprints and picture were then taken and he was questioned by the finger-print man. District Attorney Marsh, officers Fitzsimmons, DeBrine and another detective from about 7:30 to 8:30 that evening during which he related in detail his actions and the people with him during the evening of Aug. 4, to noon of August 5, 1944. He was again questioned by them at #2 police station from 9:20 till after 10 during which time he denied knowing anything about the Kennedy murder when Marsh said to him, "It's no use to lie to us because we have the dead evidence on you," and he told them again and again of his actions on the night of the murder. The next morning, Aug. 18th, he was questioned from 30 to 45 minutes by Marsh along the same line as before and Marsh said to him, "You are lying to us, and we know it," and he said, "Well, you ask me for the truth and I told you". In the afternoon he was again questioned by two Falls detectives whom he did not know and again denied killing Mrs. Kennedy and other charges. About an hour later officers DeBrine and Fitzsimmons again questioned the appellant and again he denied killing Mrs. Kennedy or entering her home and answered various questions. Again at about 3 o'clock that afternoon he was questioned by

Fitzsimmons, DeBrine and Marsh and he again asserted he had told the truth and all he knew and DeBrine said, "You are sure you told us all you know," and appellant said, "I sure have," and DeBrine said to Fitzsimmons, "Let's take him to Buffalo," and to defendant "We will put you on the lie-dector, we will tell what you done," and the appellant said O. K. and they left for Buffalo about 10 minutes later (rec. pp. 239, 410, 411, 413-417, 427, 432-442).

Officers DeBrine and Fitzsimmons took him to Buffalo to the lie-detector room at police headquarters. Officers Fitzsimmons and DeBrine were in the room with Buffalo Police Office Schasre, the lie-detector operator, about 30 minutes before they took him therein where he was questioned by Schasre. He was placed on the lie-detector machine twice and each time denied the killing of Mrs. Kennedy and other facts claimed to be material evidence by the police. When Schasre asked him, "Wasn't these your shorts," and he said, "No, they isn't my shorts," whereupon Schasre said, "You are a lying black son-of-a -bitch," and he said "You don't have no right to call me that, those isn't my underwear," and during this statement he had gotten up and walked over toward Schasre and shaking his hand in his face told him, "You don't have any right to call me that," and Schasre said, "Well, you are," and Barnes then said, "Well don't call me no more, because you are wrong" and Schasre broke for the door and then Officer Golombeck, weighing 185 pounds entered and said, "What is wrong," and Schasre said, "Captain, this young negro made a jump for me," and as Barnes told him he didn't and said, "I got up to tell him not to call me another black, lying son-of-a-bitch," and as he was trying to explain Golombeck said, "You are a black, lying son-of-a-bitch" and about that time hit Barnes and not one Buffalo Police Officer took

the stand to deny this evidence though they had been in court. When Golombeck struck Barnes he knocked him on his face on the concrete floor and before he could get up some one kicked him under the arm. He tried to get his head under the table where they could not stomp his head and some one stomped him on the back (substantiated by the evidence of Dr. Hayes) and then Officers Fitzsimmons and DeBrine came and they asked him what was wrong with him and he told them, "You know what it was all about," and Barnes pulled himself up by taking hold of the legs of those officers who "sat" him in a chair (Fols. 1343-1347). They said that when Schasre went out that Barnes bit a hole in the lie-detector hose but he did not have time to bite any hole and it could not be done and was not produced at the trial though Officer DeBrine was challenged to do so while on the stand (rec. 335, 445-448, 336, 453, 421-423, 449, 450, 346, 347).

While Barnes was on the floor they took his clothes off (rec. p. 450).

DeBrine and Fitzsimmons continued to question him together with another officer whom he did not know but who said Mr. Marsh was his boss and who told him, "Why don't you tell me the truth, that I can make it easy with you, Mr. Marsh is my boss, I call him up and tell him you have confessed," and he told him "I ain't going to say nothing because I didn't do it. What is the use of my telling a lie. I know I didn't do it." They then placed him in an auto, DeBrine driving. They kept asking him questions and Fitzsimmons told Barnes "We will get you to a doctor just as quick as you start talking." When they got to the top of Grand Island bridge Fitzsimmons said, "Bob, you remember some crime happened here away back." It was some man thrown off that bridge into Lake Erie. He told him

the man was thrown off the bridge for lying and showed the spot where it was, stopping the auto at the top of the bridge. Barnes told him, "Well, what are you telling me about it for? I haven't done any crime," and Fitzsimmons said, "Well, now, tell us the truth. We will make it light on you," "Well, we will see about getting a light sentence," and Barnes said "Mr. Fitzsimmons, I haven't done any crime you have accused me of." While on the bridge they told Barnes that the man who threw the other man in the river was waiting electrocution. They stopped at the Carborundum plant but did not see appellant's wife. They then asked Barnes if he did it and he said, "No, I didn't" and Fitzsimmons said, "Well, you are going to tell us a better story than that" and they pulled up at the Shredded Wheat plant and DeBrine said, "Bob, if you will tell us the truth, we can help you" and he said "Well, Mr. O'Brian, I didn't do it. What do you want me to do, say I done it," and DeBrine said, "Well, we known you done it, but we want you to tell it from your own mouth," and Barnes said, "Yes I did, I did," and DeBrine said "How did you do it" and he said, "I done it, whatever you ask me." He said, "Well, what did you do," and Barnes said, "Yes, I killed Mrs. Kennedy." They then locked him up in the police station (Fols. 1361-1370). This was about 6 o'clock. They told him the doctor would be there in about twenty minutes. The doctor bandaged his side at No. 2 Police station after 10 o'clock. He felt sleepy. He then was questioned by DeBrine, Fitzsimmons and Marsh at great length (Fols. 1380-1383), whereupon he gave the first written statement (Fols. 1380-1407).

They took Barnes about 8:30 the next morning to police headquarters and DeBrine took hair from his head and privates and then locked him up. This was Saturday. They

did not let appellant smoke. He only remembered signing one written statement on different sheets of paper. He acknowledged his signature as being on the second statement (rec. pp. 452, 455-457, 474-476, 460).

The conversation of Officers Fitzsimmons and DeBrine on the Grand Island Bridge formed the basis for every alleged admission of guilt by defendant and his signing of People's Exhibits 46 and 47, supplemented by the threat, as he understood that if he didn't talk he would be taken back to Buffalo (rec. pp. 473, 474).

Defendant's Objection.

"Mr. Newton: I object to what was said as the result of threats, express and implied, and to any evidence admitted in violation of the due process of law clause of the State Constitution of New York and the due process of law clause of the 14th Amendment of the United States Constitution, and in violation of the clauses of the respective constitutions compelling the witness to become a witness against himself on a criminal charge.

The Court: Do you wish to cross examine as to what was said?

Mr. Newton: No. I rest on just what he testified to on that objection.

The Court: Objection overruled" (rec. p. 267).

The same objection and ruling was made four times (rec. pp. 280, 298, 304, 305).

The Court in its charge read the part of Sec. 395, Code Cr. Pro. in so far as it pertained to confessions obtained by reason of fear produced by threats (Fol. 1869) and in that connection said: "The burden rests upon the People of the State of New York to establish that the alleged admis-

sions and confessions made by the defendant were voluntarily made upon his part and not produced by threats or fear," therefore, the admissions and confessions were, in effect, limited to those produced by fear in the defendant's mind produced by threats (rec. pp. 623, 624).

The test is not what was actually said or done by the officers but what the defendant believed from what they said and did and by using the word "Bob" there is no denying the fact that by what the officers did and said on the Grand Island Bridge as testified to by Fitzsimmons and DeBrine they left the impression on the already beaten and injured defendant that if he did not admit the killing of Mrs. Kennedy to the officers he would be executed at Sing Sing prison for not telling the truth, therefore, the admissions and confessions obtained as the natural flow therefrom assisted by continual questioning, failure to arraign the defendant when the officers had ample grounds to do so, their not allowing the defendant to see any person without the presence of an officer, all as evidenced by the prosecution's witnesses, rendered the admissions and alleged confessions incompetent as matter of law even under Sec. 395, Code of Criminal Procedure. There was no question of fact on the issue involved for the jury.

In *People v. Randazzio*, 194 N. Y. 147, the following, pp. 154, 155, is very significant:

"It will be recalled that the first threat was made the night of the arrest, while they were crossing the bridge over the river, at which it was claimed some one called out that they ought to throw them into the river. It is not claimed that this statement was made by any of the officers, but if made, it came from some unknown person in the crowd that was evidently following along in the trail of the officers having the defendant and Barretta in charge. But it appears that there was a doubt

with reference to such an expression being made by any one, for it distinctly appears by the testimony of one of the officers that it was Barretta who made the cry, stating, 'Throw me in the river.' If it was Barretta who thus cried out, certainly it could not have produced any fear in the defendant with reference to the action of the officers or other persons following them. A question of fact would thus be presented for the jury to determine whether or not there was anything in this transaction that produced such fear as to induce the defendant to confess his guilt; but it appears that no confession was asked of him that night.
 * * *

"A threat may be implied, as well as expressed and the fear engendered is alike in each case."

Peo. v. Patano, 239 N. Y. 416, p. 419.

Before People's Exhibits 46 and 47 were received in evidence it had also appeared from the People's witnesses, Officers Fitzsimmons and DeBrine, that Barnes had been in custody from 5 o'clock P. M. August 17, assaulted by a Buffalo officer at Buffalo on the afternoon of August 18, before he was returned to the Falls, and that on his return to the Falls that afternoon he admitted the killing of Mrs. Kennedy, and, after the admission, was not arraigned on any charge until Sunday afternoon August 20, at about 3:30 o'clock, in the City Court at Niagara Falls, a rare exception and when they had an uneducated negro as disclosed from his language as a witness and as well that he had no clear understanding of his arraignment, and, further, from the evidence of Dr. Hayes, which was not contradicted, that the officers prevented him from examining the appellant on the afternoon of August 20, 1944, while in custody. After the close of the evidence the petitioner moved to strike these Exhibits from the evidence and for a mistrial because of their prior reception, which motions were denied with exceptions. This evidence presented no question of fact for the jury and as matter of law ren-

dered the Exhibits incompetent and the denial of the motions presents reversible error (rec. pp. 299, 321, 421, 422, 542, 543).

People v. Alex, 265 N. Y. 192.

In *People v. Mummiani*, 258 N. Y. 394, pp. 399, 400, the Court says:

"The police are guilty of oppression and neglect of duty when they willfully detain a prisoner without arraigning him before a magistrate within a reasonable time. (Code Crim. Pro. Sec. 165.) The conclusion is inescapable that they do this for the purpose of subjecting him to an inquisition impossible thereafter. Until arraignment before a magistrate, he is held incommunicado, without the protection that comes from the advice of counsel or the encouragement derived from the presence of family or friends. After arraignment, he has these and other helps to fortitude. In a vast majority of the cases that have come before this Court with a defense that a confession was illegally extorted, perhaps, indeed, in all, the wrong, if there was any, was done before the prisoner was brought to court, and would probably have been prevented had he been brought there without delay. * * *"

In *McNabb v. United States*, 318 U. S. 332, the Court in considering Federal statutes somewhat similar to Sec. 165, Code Crim. Pro., reversed a judgment of conviction, saying at page 345:

"* * * For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the pro-

cedure which Congress has commanded cannot be allowed to stand without making the Courts themselves accomplices in willful disobedience of law. Congress has explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law."

And at p. 340:

"And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified.' *Lisenba v. California*, 314 U. S. 219, 239-240, or 'who have been unlawfully held incommunicado without service of friends or counsel,' *Ward v. Texas*, 316 U. S. 547, 555, and see *Brown v. Mississippi*, 297 U. S. 278; *Chambers v. Florida*, 309 U. S. 227; *Canty v. Alabama*, 309 U. S. 629; *White v. Texas*, 310 U. S. 550; *Lomax v. Texas*, 313 U. S. 544; *Vernon v. Alabama*, 313 U. S. 547."

In *Chambers v. Florida*, 309 U. S. 227, the Court reversed conviction for murder holding that such convictions obtained in the state courts by use of coerced confessions are void under the due process clause of the Fourteenth Amendment and that the United States Supreme Court is not concluded by the finding of a jury that a confession by one convicted in a state court of murder was voluntary, but determines that question for itself from the evidence, saying at page 240:

* * * "To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol."

These Exhibits, 46 and 47, were made by the police officials to fit their theory of the crime charged. Note in Ex-

hibit 46 where it says " * * * the guy came over and boxed may jaw (rec. p. 311). They were not true nor his admissions to the effect that he killed Mrs. Kennedy and they were not believed by the jury otherwise they would not have in their verdict recommended to the Court the imposition of a sentence of life imprisonment. Their verdict shows evidence of doubt in view of the dreadful crime charged against the petitioner.

The following quoted from *Chambers v. Florida, supra*, p. 240, is particularly pertinent to the present case:

"We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on a equality before the bar of justice in every American court. * * *"

The defendant was taken into custody by the Falls Police at 5 o'clock P. M. August 17, 1944 and from that time never saw a friend or his wife alone or his attorney alone till after 10 o'clock A. M. August 21, 1944 (rec. pp. 238, 896).

"The uncontradicted evidence—*inter alia*, that Archraft had been held incommunicado for thirty-six hours, during which time without sleep or rest, he had been interrogated by relays of officers and investigators, showed a situation inherently coercive."

Headnote *Aschraft v. Tennessee*, 322 U. S. 143.

The petitioner was deprived of private consultation and advice of counsel.

Officer Fitzsimmons had testified that he saw the appellant's counsel at the police station at Niagara Falls about 10 o'clock on the morning of August 21, 1944, and then the record shows the following:

"Q. And I asked you to tell me—told you who I was—

Mr. Marsh: * * * Counsel is now interrogating the witness about 21st of August, * * * And these statements were the 18th and 19th. I object to it, your Honor.

The Court: The only limitation to preliminary questions is confined to whether or not these statements so-called were voluntary.

Mr. Newton: That is it, your Honor, and every question I have asked him has been passed on by the Supreme Court of the United States and on that very basis I ask those questions.

The Court: I am awfully sorry about the Supreme Court of the United States, but this is the Supreme Court of the State of New York.

Mr. Newton: Yes, but they have reversed your State courts just for not—

The Court: I do not care to get into any argument with you. I sustain his objection. You have an exception to it.

Mr. Marsh: May I just make this point? I do not object to this line of cross examination at the proper time, but just at this particular time.

The Court: That is the only basis I am ruling on. I am not limiting it.

Q. Outside his wife you allowed nobody to see him?
A. No, sir.

Q. Until after you had completed the questioning of him as you have related? A. Until after the investigation was completed. (Fols. 904-914.)

The statements had been marked Exhibits Nos. 46 and 47 for identification. (Fols. 837, 891.)

Mr. Marsh: At this time, then, I will offer them in evidence.

Mr. Newton: Then I object on the ground they are incompetent; they are taken in violation of Section 395 of the Code of Criminal Procedure, of the due process of law provision of the State Constitution and the 14th Amendment of the United States Constitution; * * * (rec. p. 298).

"Mr. Marsh: I renew my offer in evidence.

Mr. Newton: I object on the grounds stated.

The Court: I overrule the objection and say this to the jury * * *."

Then after the witness was asked at the suggestion of the Court as to any force or violence or threats being employed against the defendant, which was objected to as calling for a conclusion and it was for the jury to pass on, and answered, "No, sir, none whatever," the statements were marked in evidence and read to the jury (rec. pp. 299, 304-306).

The petitioner intended to show that when his attorney was at the police station at Niagara Falls on the morning of August 21, 1944, he was not permitted to talk to him without the presence of a police officer.

Under the United States Supreme Court decision, *supra*, the question whether or not the statements of the appellant was limited to the fact that they were secured by reason of fear produced by threat but rather whether or not they were the result of coercion. That question was not to be confined to what only occurred before they were taken but his condition, physically and mentally, shortly thereafter and his treatment as continued before and after their taking by the police officers. The jury was not to receive the matter as a question of fact till the matter was developed in all its phases.

Whether there is other evidence in the record sufficient to sustain the verdict, regardless of the confession, to which objection was made, is immaterial. If the admission of the confession denied a right to the defendants under the Constitution, such an error requires reversal.

Braum v. United States, 168 U. S. 533, 540-42.

Lyons v. Oklahoma, 322 U. S. 596.

"The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or deny a suspected participation in a crime. * * * When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands."

Lyons v. Oklahoma, 322 U. S. 596.

CONCLUSION.

The record conclusively discloses an invasion of petitioner's rights under the Fourteenth Amendment and this Court should intervene to prevent a clear miscarriage of justice.

The petitioner prays that his petition for a certiorari be granted.

THOMAS L. NEWTON,
Counsel for Petitioner.

APPENDIX "A".

Report of Case in New York Court of Appeals.
295 N. Y. 767.

PEOPLE, *Respondent* v. ROBERT W. BARNES,
Appellant.

Court of Appeals of New York.
March 7, 1946.

Appeal from Supreme Court, Appellate Division, Fourth
Department, 269 App. Div. 898, 57 N. Y. S. 2d 269.

Robert W. Barnes was convicted of murder in the first degree. The bill of particulars stated that at the time charged in the indictment, defendant choked, strangled and killed the victim while engaged in the commission of the crime of rape in the first degree upon her person. The defendant made a confession which he subsequently repudiated and on the trial testified in his own behalf and in addition to repudiating the confession charged all persons engaged in the investigation with acts of excessive brutality, drugging, fraud and sexual depravity. The officers involved denied the charges made by defendant. From the judgment of the Appellate Division, 269 App. Div. 898, 57 N. Y. S. 2d 269, affirming the judgment of conviction, the defendant appeals.

Affirmed.

Thomas L. Newton, of Buffalo (Julian J. Evans of Buffalo, of counsel), for appellant.

John S. Marsh, Dist. Atty., of Lockport, for respondent.

Per Curiam.

Judgment affirmed.

All concur except DYE, J. who dissents and votes to order a new trial.

MEDALIE, J., deceased.